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U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
JENNA MARIE DUNCAN, : 22-cv-07841-GRB-AYS
: :
Plaintiff, : :
: :
- versus - : U.S. Courthouse
: Central Islip, New York
KAHALA FRANCHISING, LLC, : :
: :
: July 25, 2023
Defendant : 2:00 p.m.
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE GARY R. BROWN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:
(VIA VIDEO/AUDIO)

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1 THE CLERK: Calling case CV-22-7841, *Duncan v.*
2 *Kahala Franchising, LLC*.

3 Counsel, please state your appearance for the
4 record.

5 MR. NASSIR: Good afternoon, your Honor. This
6 is Joshua Nassir on behalf of plaintiff Duncan.

7 MR. WILLEMS: Good afternoon, your Honor. Kyle
8 Willems, W-I-L-L-E-M-S, along with my colleague Bryce
9 Riddle and local counsel Glen Greenberg on behalf of
10 defendant Kahala Franchising.

11 THE COURT: Great who'll take the lead on this?

12 MR. WILLEMS: I will, your Honor.

13 THE COURT: Okay. Very good.

14 All right. Counsel, we're here for a pre-
15 motion conference. You've both done a great job, you've
16 all done a good job on the papers so I am sort of
17 familiar with this and I do reserve the right to decide
18 the motion, deem it made and decide it. I don't know if
19 I'll do that today or not, but that means you should feel
20 free to make all your arguments.

21 So let me go to defense first because you want
22 to make the motion, so why don't you outline it for me,
23 please?

24 MR. WILLEMS: Sure. Thank you, your Honor.
25 Well, really this case and this motion hinges on what is

Proceedings

1 reasonable for a consumer in the circumstances pled in
2 plaintiff's complaint?

3 In this case, the question is what is
4 reasonable for a consumer as a broad member of the public
5 when they went into a Cold Stone Creamery in New York and
6 purchased ice cream from a tub that had a placard on it
7 that said pistachio?

8 And based on plaintiff's arguments, which
9 really hinge on Sections 349 and 350 of New York's
10 General Business Law, that's basically the Deceptive
11 Trade Practices, that it comes down to what that consumer
12 faces when they purchase that product. In the complaint
13 there's a picture of the tubs of ice cream with the
14 placard with each flavor.

15 What I'd like to do briefly, your Honor, is
16 show that even under Rule 12's heightened pleading
17 standard there are really no issues of fact or law that
18 need to be resolved through discovery or some other
19 mechanism. And to show that, I'm going to quickly go
20 through the claims for relief.

21 As I mentioned before, the main claims for
22 relief are claims 1 and 2 which is those trade practices
23 claims.

24 The first one is Section 349. So that deals
25 with, and I quote, "Deceptive acts or practices in the

Proceedings

1 conduct of any business, trade or commerce.

2 THE COURT: Yes.

3 MR. WILLEMS: Section 350 is very similar.
4 It's false advertising. And your Honor, I'm sorry, I'll
5 try and paraphrase because I know you know this.

6 THE COURT: No, counsel, just to tell you I've
7 written on similar cases, right? I've written a lot of
8 349, 350 cases including some in the sort of consumer
9 purchasing context, so I am familiar with the background.

10 I guess I would jump ahead a little bit. I'm
11 going to try to direct you.

12 I think you've got a problem on your standing
13 argument. In other words, I think the Second Circuit
14 case law here is such that if there's a claim on the
15 statute, she didn't have to purchase the mango and so
16 forth to make this all work. I think Second Circuit case
17 law suggests otherwise.

18 But I'm much more interested in your argument
19 about whether a consumer buying pistachio ice cream, and
20 the only representation in the complaint is a picture,
21 one word, pistachio on a tub of ice cream, whether they
22 should expect pistachio ingredients, real pistachio in
23 there. And I'm looking at the cases from the southern
24 district on vanilla, but then there's the *Blueberry Bagel*
25 case. They don't all seem to square up to me. So where

Proceedings

1 does this fall on that continuum?

2 MR. WILLEMS: Well, your Honor, that's right
3 where I was going so I'm glad you asked that because I
4 spent a lot of time reading these cases to figure out
5 what makes a case fall under the camp of justifying being
6 dismissed on a Rule 12 and what justifies a case
7 surviving a Rule 12. And there are a few key things that
8 these cases have in common, and not just by my
9 impression, but they actually expressly say that.

10 So let's talk about the cases that courts have
11 routinely held should be dismissed on Rule 12 in these
12 circumstances.

13 So the standard is not really at issue. Right?
14 We all understand it's a reasonable consumer test. You
15 look to see if there's something that's material,
16 misleading, and you look to the context, the whole
17 context, and this is important, of the experience that
18 that consumer had.

19 Now, I'll just give another example. Right?
20 So if you buy vitamin supplements or something like that,
21 you look at not just the front of the bottle but you
22 rotate it around. What do the ingredients say? And you
23 make a determination as to what is reasonable.

24 And so there's one thing that is not in the
25 parties' letter that I do quickly want to bring to the

Proceedings

1 Court's attention before I talk about whether this case
2 falls under the camp of should it be dismissed or not.

3 Since we drafted our letter briefs to the Court
4 we've had Kahala Franchising investigate the underlying
5 facts because to be honest, your Honor, I know this isn't
6 legally persuasive to say, but I've been a regular
7 customer of Cold Stone and what my recollection of what
8 Cold Stone is famous for is you go there, you see tubs of
9 ice cream. Above it are boards that say -- you could do
10 two things pretty much. You can pick a recommended
11 sundae, so it'll have a picture of let's say vanilla ice
12 cream with chocolate sauce and Heath bars pounded into
13 it, or you can make your own. And so it'll have a three-
14 step. It'll say pick your flavor. So you look at the
15 tubs, you pick your flavor. Then they take that ice
16 cream and they actually slap it on, you know, the
17 proverbial cold stone and they use these metal, I don't
18 know, they kind of look like flippers. They bash in the
19 ingredients you pick, or they call them mix ins, and then
20 you put it in a cup.

21 THE COURT: All right. Counsel, I have to
22 interrupt you one second. I guess in the way of full and
23 fair disclosure, I am familiar with the process. Right?
24 So I haven't done it in a number of years, but I have
25 been there and watched them lather the ice cream together

Proceedings

1 with the chips so they're not so whatever and I have
2 been through that. So I'll just put that out there for
3 you.

4 MR. WILLEMS: Well thank you, your Honor.
5 Well, I bring that up not to bore you but because we just
6 sent a letter to counsel which in fairness to counsel,
7 I'm sure he hasn't had a chance to read it because I sent
8 it last night and this has been developing for us
9 quickly. But we had the store reps send us pictures and
10 be able to tell us that they'll be able to testify as to
11 what the actual shopping experience would have been
12 because the case law says even if it's not in the
13 complaint, we have to look at the full context. It's
14 kind of unique in a Rule 12 analysis like that. And then
15 the full context will show to the Court, if we get to
16 bring our motion, that what is contained in the
17 complaint, which is simply that plaintiff was presented
18 with a placard that said pistachio and this bin of
19 pistachio ice cream isn't actually what she was presented
20 with. She walked in and it was just like my experience,
21 right directly above that was a sign that says pick your
22 flavor.

23 And so why is that important? Well, looking at
24 the whole context, the gravamen of this complaint is that
25 there was no indication that this was anything but

Proceedings

1 pistachio ice cream that may have contained real
2 pistachios. And that is, quite frankly, untrue. There's
3 literally a sign above it that says pick your flavor and
4 add your mash-ins, or whatever you call it. And the
5 thing next to those tubs of ice cream is all the things
6 you can have it added to it.

7 And so that's one thing I want to add. But
8 then turning to which camp does this fall in regardless,
9 the cases that generally get dismissed have these things
10 in common. And again, this is case law, not just my
11 impression.

12 First, that they don't have anything on the
13 packaging or in the advertisements that say the words
14 something like contains or sometimes it's made with,
15 anything that indicates it actually contains the
16 ingredient that the flavor may be mimicking.

17 The second thing is whether or not the word at
18 issue can be used as simply a noun or both as a noun or
19 an adjective.

20 So that's kind of the center of the vanilla
21 cases. Vanilla can be a flavor and it can be an
22 ingredient. Vice versa if you look at the *Colpitts* case
23 that plaintiffs rely on, it talks about a smokehouse
24 flavor of an almond, but it can't be both. It can't be
25 the noun and the adjective. So that's the next huge

Proceedings

1 differentiator.

2 And then again, when you look at the whole
3 context, is there anything that indicates it's a flavor?
4 In this case, well we're going to present to the Court
5 there's a sign that says it is in fact a flavor.

6 So I would say when you look at those three
7 things, this falls squarely into the camp of the cases
8 that tend to have these claims dismissed.

9 Now, what does the other camp look like? Your
10 Honor, you brought up the blueberries case which was
11 about a blueberry bagel. And so in that case, you
12 naturally see what you may think the ingredient is. In
13 that case, the plaintiff picked up a blueberry bagel and
14 it had chunks in it, what appeared to be blueberry.
15 Well, it turns out that was not the case. So that's one
16 example of actually indicating that something contains an
17 ingredient.

18 That's not the case here. If you look at the
19 picture, it's just this green goop and frankly, you look
20 at all the other flavors, there's no chunks of anything
21 in them.

22 The next would be, again, that the product
23 advertises made with or contains. That might help get
24 over a Rule 12 analysis but that's not the case here.

25 So that would be -- I want to differentiate

Proceedings

1 those two camps to explain the difference between why I
2 think this case on the merits should be dismissed versus
3 some of the cases that have dealt with I would say
4 deceptive flavoring issues and has not been dismissed.

5 I will stop talking for a second about the
6 deceptive trade claims to see, your Honor, do you have
7 any questions on that?

8 THE COURT: No, I'm good. Keep going.

9 MR. WILLEMS: Okay. The next claim then is the
10 expressed warranty claim. Well, obviously under the UCC
11 and expressed warranty, there actually has to be an
12 expressed warranty to set the basis for a claim. In this
13 case, the plaintiffs have not specifically pled what is
14 that expressed warranty or what is that affirmative
15 factor promise that the buyer will relate to the goods
16 that becomes part of the bargain?

17 I think this would be a different case, again,
18 if it said something made with real pistachio or
19 something like that, but that's not the case literally.
20 Even if we just take the complaint on its face, it just
21 says pistachio and nothing else. So I don't see an
22 expressed warranty that actually says by purchasing this
23 product you are getting something that says it contains
24 actual pistachio, nor is that anywhere in the complaint.

25 Turning to the claim for a breach of implied

Proceedings

1 warranty, frankly, it largely has the same problem. You
2 know, an implied warranty says that -- really focuses on
3 the merchantability of the good and does it conform, this
4 is a direct quote, "to the promises or affirmations of
5 fact made on the container label."

6 Again, in this case, there is nothing that says
7 that this product contains or implies in any meaningful
8 fashion that it contains real pistachio. More
9 importantly, even if it did, does this product no longer
10 become merchantable?

11 In one case, one of the vanilla cases, it
12 talked about soy milk and saying okay, the products may
13 not contain the requisite levels of real soy that
14 plaintiffs are complaining of, but is it literally unfit
15 to drink? Is it unfit to have a vanilla flavor? The
16 answer is no.

17 The last issue is the unjust enrichment claim.
18 Courts are pretty clear on that in cases cited by both
19 parties that if the claims are merely duplicative of the
20 other claims, it should not stand. I think plaintiff's
21 argument is that well we're pleading it in the
22 alternative, which they do have a right to do. But
23 again, if you look at the unjust enrichment allegations
24 compared to the others, it actually does just mirror
25 those claims. And so even if we dismiss those claims,

Proceedings

1 could plaintiffs get over these same humps that they had
2 before which is that did the full context of the products
3 that they were presented with materially mislead them as
4 would a reasonable consumer? I think you'd have to apply
5 that test. And I don't see how they get over that hurdle
6 for the reasons they've already bemoaned earlier.

7 So your Honor, we would like to reserve
8 bringing a standard argument but I'm not going to rest on
9 that today. I'd like to just preserve that right. But I
10 think we don't have to get that far because if we just
11 look strictly on the merits of the claims, there's no
12 issue of law or facts for this Court to resolve even if
13 we rely on the pleadings.

14 THE COURT: Excellent. Counsel, thank you so
15 much. Let me go to your adversary. What would you like
16 to argue in response, please?

17 MR. NASSIR: Thank you, your Honor. Just to go
18 in line with everything, as to standing, you know, I
19 think as your Honor acknowledged, the Second Circuit and
20 other circuits recognize whenever there's a similar type
21 of injury in advertising, the plaintiff has standing to
22 purchase un-purchased products.

23 But to move on to the substance, I think the
24 key here is almost what defendant said. Look at the
25 context. And what the defendant is trying to do is that

Proceedings

1 they're trying to characterize a very specific type of
2 case which they even admit has been monitored, the SDNY
3 vanilla cases, because they've been brought by one
4 attorney, and to apply that very narrow type of case to
5 any consumer case regarding ingredients, and I think
6 that's improper. And if you look at the context of what
7 this case is about, it doesn't fit.

8 The vanilla cases, and I believe I put the
9 citation in our letter, the courts have recognized that
10 vanilla is very specific in the sense that it usually
11 does it as a flavor. It's usually seen as a flavor. For
12 example, if you're buying a vanilla creamer, you're not
13 going to expect them to scrape out some vanilla beans in
14 there. If you're buying a vanilla cookie, you're not
15 going to expect some vanilla beans scraped in the cookie.
16 And these cases differentiate between what's typically an
17 ingredient and what's typically a flavor.

18 And the products at issue in this case,
19 pistachio ice cream, mango, coconut, orange, these are
20 typically ingredients. And I think again, and you can
21 look at the context, Cold Stone's a premium brand, which
22 all this is alleged in the complaint, Cold Stone's a
23 premium brand. It's expensive. And even cheaper ice
24 cream brands such as Thrifty, I believe it's called Rite
25 Aid in New York, for example, their ice cream contains

Proceedings

1 pistachio. And this is what consumers are accustomed to.
2 They're accustomed to ice cream containing the
3 ingredients that they say. And I think that's what the
4 difference is. We're not talking about a flavor like
5 vanilla, we're talking about something that is typically
6 an ingredient. And this is what consumers are accustomed
7 to. And it's not that, you know, Cold Stone never has an
8 ingredient in their ice creams. For example, as we
9 allege in the complaint, their strawberry ice cream
10 contains strawberry. The banana ice cream contains
11 banana. And you know, by using defendant's logic, you
12 know, saying oh by the appearance you wouldn't be able to
13 tell, I mean look, their banana ice cream, as you see in
14 the complaint, it's banana colored, it looks like banana
15 and it has banana.

16 And I think what's important here is we look at
17 what is the type of product we're talking about. We're
18 talking about a premium ice cream. And as the complaint
19 alleges, ice cream typically has the ingredient that it's
20 named after.

21 And to address the pick your flavor, that was a
22 letter that we received last night where they claim that
23 on the wall it says pick your flavor. Again, first, this
24 is outside the four corners of the complaint, but I don't
25 think it's an issue so I'd like to address it.

Proceedings

1 THE COURT: Okay.

2 MR. NASSIR: It's specific to ice cream. Ice
3 cream is typically referred to as flavors despite ice
4 cream typically containing the ingredients that they're
5 named after just as how defendant's banana ice cream
6 contains banana. For some reason, there is a select
7 number of products that don't have the ingredients
8 they're named after. It's not what consumers expect when
9 they purchase ice cream, let alone premium ice cream.
10 And defendant is trying to seek a premature determination
11 that for some reason with these premium ice creams
12 consumers wouldn't expect the ingredients.

13 So I would say at this stage we've shown that
14 it's at least plausible that a consumer can look at this
15 premium ice cream and expect the ingredient they're
16 promised especially whenever cheaper brands can live up
17 to their name.

18 I think I'll leave it at that on the reasonable
19 consumer front.

20 THE COURT: Okay.

21 MR. NASSIR: As for the warranties, I think
22 your Honor knows they pretty much rise and fall with the
23 GBL claims but the one thing that I would like to address
24 is about it being fit for consumption and merchantable.
25 That is not what the courts follow.

Proceedings

1 We cite two cases in that regard, *Goldenberg v.*
2 *Johnson & Johnson* and *Hesse v. Godiva*. I have personal
3 experience with the *Godiva* case and I could tell you with
4 that case that was not an issue. It's simply whether it
5 conforms with the advertising. Whether it's merchantable
6 is I believe a separate subsection of the warranty
7 statute. The courts never looked at whether it's
8 merchantable. And I think you can just take a look at
9 that case we cite, *Hesse v. Godiva*, that'll make that
10 clear.

11 As for unjust enrichment, I think defendant
12 characterized that we believe that under Rule 8 we just
13 have a right to plead claims in the alternative and it
14 would be premature to dismiss the unjust enrichment claim
15 at this stage.

16 THE COURT: Okay. Well --

17 MR. NASSIR: And do you have any questions?

18 THE COURT: Yes, I do actually. I have a
19 couple of things. You used the phrase a couple of times,
20 several times, of this being a premium ice cream. I
21 happen to have a recollection, and I'm not going to
22 depend on this to decide the case, but it's something I
23 just want to raise with you. You know, as your adversary
24 pointed out Cold Stone, as I recall, I haven't been there
25 in a long time, but part of the fact that it was a little

Proceedings

1 more costly than other ice cream retailers was that
2 there's an experience aspect. In other words, you go in
3 and they take the ice cream and they mix things in, they
4 flip it around, and it's like a little bit of a show kind
5 of a -- which has been a marketing (indiscernible) for a
6 while.

7 My question is when you call it premium ice
8 cream, I mean if you were to re-plead this, do you have
9 evidence that says they only use actual ingredients or
10 that there are representations made about the nature of
11 the ingredients that makes it a premium ice cream? Or is
12 it just the price point?

13 MR. NASSIR: Good question, your Honor. When
14 we say premium, we're referring to the price. And that's
15 also what I was getting at when comparing the ice cream
16 to, for example, Thrifty, where the ice cream is much
17 cheaper. And you know, there's still the ingredients in
18 the cheaper ice cream. Yeah, by premium I'm talking
19 about the price point.

20 THE COURT: Okay. And then the other question
21 I was going to ask you, you plead in the complaint, in
22 the four corners of the complaint, when you go to the
23 website you can see there isn't any pistachio in there.
24 My question to you is from a 349, 350 perspective,
25 doesn't that actually aid the defendants in the sense

Proceedings

1 that they're not concealing this? In other words, in a
2 world of smart phones, while you're on line if you wanted
3 to, you could check to see is there pistachio in there?
4 And you see no, actually not. Doesn't that help them in
5 some ways?

6 MR. NASSIR: That's a very good question, your
7 Honor. I think the answer is no. And I'll be happy to
8 brief this further if you'd like. The Second Circuit
9 decision in *Mantikas* followed --

10 THE COURT: Okay.

11 MR. NASSIR: -- the Ninth Circuit decision in
12 *Williams* where consumers, in that case, they're not
13 expected to check, for example, the side or back label of
14 products if there's a plausibly deceptive representation
15 on the front. And we're talking about online, that's an
16 even greater burden.

17 I can tell you a case I actually litigated,
18 *Rose v. HP* in the Northern District of California dealt
19 with online disclosures. And there's a plethora of cases
20 that say that if there's a plausibly deceptive
21 representation, consumers aren't required to look online
22 to check. I don't think any reasonable consumer is going
23 to be standing in the line at Cold Stone, there's someone
24 behind them waiting to order ice cream, and they say hm,
25 I wonder, let me pull out my smart phone and go on the

Proceedings

1 website and go on the ingredients list.

2 So I would say it's not reasonable concern to
3 be able to do that and there's a plethora of authority
4 out there that say that consumers aren't expected to go
5 online to cross check these types of representations.

6 THE COURT: Okay. And then the last question I
7 would ask you is how was your client harmed?

8 MR. NASSIR: Sure. So again, it goes to --
9 it's essentially a price premium. It's that if this ice
10 cream was advertised correctly, it would be cheaper. And
11 my client, as well as other putative class members, have
12 paid a premium for the product based on its advertising.
13 And the way it plays out is, you know, if this case were
14 to progress and it were go to class certification, we
15 would hire an economist to do what's called a hedonic
16 regression analysis. And what they do is they'll parse
17 out like hey, this ice cream has a bundle of sticks of
18 values between the name and the taste and the price. And
19 then one of those pieces of value would be the perception
20 that the pistachio ice cream has pistachio for example.
21 And that maybe instead of -- I apologize, your Honor, I
22 don't have the prices in front of me, but I'll give you
23 just a hypothetical example. Instead of \$5 a scoop it
24 should be \$4.50 a scoop or \$4 a scoop. And it's that
25 difference in price based on this deception that my

Proceedings

1 client and other putative class members were injured.

2 THE COURT: Okay. All right. Thank you.

3 Would defendants like to make any reply?

4 MR. WILLEMS: Just briefly, your Honor. I
5 think cause frankly on the depths of the law that are
6 underlying what we're talking about, it seems we're all
7 in agreement which is you have to look at the full
8 context. And so, you know, the product and the context
9 and what the product is marketed. So that includes the
10 website.

11 But most importantly, as I talked about
12 earlier, and this was the *Fink v. Time Warner* case that's
13 actually cited by plaintiffs, that means that if the
14 complaint, and I quote, misquotes or misleads an excerpt
15 of the advertising, we have to look at the full context
16 and we can bring that in. And I think we don't have to
17 do it. It's already on its face enough to show that
18 there is no reasonable confusion here. But that's
19 something I want to note.

20 The other thing I think to end it was, this is
21 a direct quote from opposing counsel during his comments,
22 he says ice cream is commonly referred to as flavors.
23 And I think that's kind of the nail in the coffin as I
24 look at it because the test is -- a reasonable consumer
25 is defined more broadly as what would a substantial

Proceedings

1 amount of the consuming public view when they encounter
2 this product? And based on that, I think I agree, we
3 think of ice cream as flavors until we're shown
4 otherwise.

5 So I'll stop digressing, but I think in the
6 long of it, your Honor, based on even what's pled in the
7 complaint, there's nothing indicating that this is the
8 type of case that should survive a Rule 12. It doesn't
9 fall under that camp that I talked about earlier.

10 THE COURT: Okay. Very good. Thank you.

11 All right, counsel. So here's what I'm going
12 to do. I'm going to go ahead and deem the motion made
13 and decide it, and I can do that mainly because counsel
14 on both sides have done a fine job of laying all out the
15 relevant law, the relevant facts, and making this very
16 clear, and that's something your clients should be
17 grateful to you for because you've saved them a great
18 deal of time and aggravation and frustration and expense
19 by being good lawyers. And I thank you for that as well.

20 So with that in mind, I'm going to decide this.
21 So defendant has moved to dismiss the claims under Rule
22 12. I'm not going to belabor the standard here. I'm
23 familiar with what the standard is as set forth in so
24 many cases taking the allegations of the complaint as
25 true and drawing inferences in favor of the non-movant

Proceedings

1 which in this case is the plaintiff. Are the claims
2 plausibly pled?

3 And this case is quite interesting. And as I
4 indicated, there is an Article 3 standing argument as to
5 other flavors I don't really need to deal with other than
6 to say I don't believe that that's the case here in the
7 Second Circuit. So I don't think that will carry the
8 day.

9 But that doesn't matter because to get to the
10 core of it, which is did the plaintiff, in buying an ice
11 cream at a shop, a retail shop where it's sold by the
12 scoop and so forth from a vat that is labeled simply with
13 the word pistachio and nothing more, and that can be seen
14 very clearly in the complaint on pages 4 and 5, your
15 photographs, which are actually quite, quite helpful,
16 could the plaintiff expect that by definition there would
17 be pistachios in, or real pistachio ingredients in the
18 ice cream? And I think the answer is no.

19 I'm going to say a few things here that relate
20 to other cases. I do follow the line of case law that
21 defendants have cited relating to vanilla in the southern
22 district. And while there may be some differences
23 (indiscernible) in *Cruz v. D.F. Stauffer Biscuit Company*,
24 which is at 2021 WL 5119395, in this regard is quite
25 instructive. All right? Those are the cases that hold

Proceedings

1 the word vanilla made representation about flavor rather
2 than the ingredient.

3 Now, the important thing here is there is no
4 representation made, and I even asked counsel if they
5 were to re-plead this case would they have anything
6 additional to add in terms of the quality of the
7 ingredient, the premium price at Cold Stone, is that
8 derived from representations about all-natural
9 ingredients or the highest? That's not the issue. That
10 hasn't been raised here (audio interference) --

11 MR. NASSIR: Your Honor?

12 THE COURT: Yes?

13 MR. NASSIR: Sorry, I wasn't sure if that was a
14 question.

15 THE COURT: It wasn't. Go ahead.

16 MR. NASSIR: My apologies.

17 THE COURT: (Audio interference) --

18 MR. NASSIR: Sorry, your Honor, you're cutting
19 out on my end. I deeply apologize.

20 THE COURT: (Audio interference).

21 MR. NASSIR: I'm sorry, I can't -- I'm not sure
22 if it's my line. The voice keeps going in and out on my
23 end.

24 MR. WILLEMS: You're cutting out on my end as
25 well, your Honor.

Proceedings

1 THE COURT: (Audio interference).

2 (Pause in proceedings)

3 MR. NASSIR: This is Joshua. Is anyone still
4 on the line?

5 MR. WILLEMS: This is Kyle S. Willems.

6 THE CLERK: Okay, the judge is calling back in.
7 Just give him a second.

8 MR. WILLEMS: Okay.

9 MR. NASSIR: Thank you.

10 (Pause in proceedings)

11 THE COURT: Okay. So this is Judge Brown and
12 I'm back. I called in on a landline because obviously
13 the cell service isn't working for me today.

14 So how much of what I said didn't you hear I
15 guess is my question?

16 MR. NASSIR: Thank you, your Honor. This is
17 Mr. Nassir. I caught your ruling but after you provided
18 your ruling is where it started to go in and out for me.

19 THE COURT: Oh yes, I was sort of still in the
20 middle of the ruling but I'll sort of pick up where I
21 was. And I think I know where you asked me a question so
22 maybe I can take it from there. My staff also told me
23 they couldn't hear me either, so there we are.

24 So anyway, I had asked defense counsel, or I'm
25 sorry, plaintiff's counsel rather, whether or not there

Proceedings

1 were additional facts, representations made about the
2 quality of the ingredients. Right? Whether it was from
3 actual, healthful, or anything like that and the answer
4 is those sorts of representations are not available to us
5 now. So that's not something that's at issue here.

6 And the question is the determination that this
7 is a premium ice cream is based solely on price point.
8 And as we've discussed, price point could be based on a
9 lot of things. So again, I think this goes back into the
10 notion that consumers would not be deceived by the sole
11 representation of pistachio.

12 Now, I was drawing everyone's attention to
13 pages 4 and 5 of the complaint where there's a single
14 word describing the ice cream flavor, pistachio. And
15 again, those photos are very helpful. But you know, also
16 in there is things like, and these aren't the best
17 examples, but salted caramel and cotton candy, butter
18 pecan. I don't think that someone buying those ice
19 creams are necessarily saying oh there's definitely
20 butter in there or there's definitely cotton candy.
21 Probably not. Cotton candy is absolutely artificially
22 flavored. So I don't think that these single word
23 descriptions of the ice cream can reasonably be relied on
24 by consumers or would be deemed as misleading to
25 consumers.

Proceedings

1 So I'm finding the claim implausible for that
2 reason. And again, I'm relying largely in terms of the
3 law on the *D.F. Stauffer Biscuit Company* case, *ShopRite*
4 *Supermarket* cases, the cases dealing with vanilla as a
5 flavor as compared to vanilla as a plant which is a
6 vanilla bean. I think the same logic applies here to the
7 pistachio cases.

8 So I'm going to find that the claims are not
9 plausible. I am deeming the motion granted and made.

10 Now, I don't know where we kind of lost the
11 audio record. I don't plan on writing this. If anybody
12 wants a copy of my decision, you can obviously order the
13 transcript of this conference.

14 Is there anything else I should deal with
15 today?

16 MR. NASSIR: Your Honor, this is Mr. Nassir. I
17 would ask just that in order to further prove our
18 allegation as to what reasonable consumers expect, you
19 know, we would respectfully request some time to conduct
20 a consumer survey, you know, which would show consumers
21 exactly the picture in the complaint and say that based
22 on the representation and the appearance would you
23 expect -- for example, we can isolate just one flavor if
24 if your Honor would like it to be done differently,
25 expect pistachio in the product. And I think that could

Proceedings

1 maybe shed some light to support plaintiff's allegations
2 that when it comes to ice cream, people expect the
3 ingredients. That's --

4 THE COURT: Well, that's interesting. Counsel,
5 what I would say is this. If you told me you had such a
6 survey, right, and you wanted to amend to include that, I
7 would say go ahead. But there's no way I'm going to give
8 you enough time to conduct a survey and redraft the
9 complaint. I mean we don't have that sort of luxury. In
10 other words, I don't think you can get that done in 30
11 days, right?

12 MR. NASSIR: I believe I could get that done in
13 30 days, your Honor.

14 THE COURT: Wow. Okay. Well, let me hear
15 defendant on that before I say anything else.

16 MR. WILLEMS: Thank you, your Honor. Well,
17 first of all I would say that the Court has ruled on the
18 claims already so the time to seek to amend the complaint
19 properly would have been done before this, not after the
20 ruling. So I believe it's barred for that reason alone.

21 The second reason, if I go to the merits, you
22 know, there's cases that have these consumer surveys and
23 still get dismissed on Rule 12 because they're still
24 going to have the same problem which is again, I talked
25 about what camp does it fall into and does a survey

Proceedings

1 change the fact that it says it's a flavor on the
2 signage, that it doesn't say made with or anything like
3 that and it doesn't have any visual indication that it
4 contains actual chunks of pistachio.

5 So I get the idea of a survey but it still
6 doesn't get over the threshold issues that I raised that
7 are common in cases where a Rule 12 motion was granted
8 even in light of a survey.

9 THE COURT: Right. I hear you. So the real
10 question that's being raised for me now, and I know
11 you're all in the ice cream weeds as such, right, and I
12 look at it from a broader perspective which is does
13 plaintiff have the right to re-plead? And of course we
14 all know the standards under Rule 15, it's very liberal,
15 and federal courts like to give everyone an opportunity
16 to be heard on the merits and so forth.

17 So here's what I'm going to do. I'm not going
18 to rule one way or the other. I don't know that a survey
19 gets you over the top. It may, it may not. But I will
20 give you 30 days to file a proposed amended complaint and
21 I would encourage you to recognize that such a filing is
22 not aspirational. So if all you have at the end of that
23 is a survey that says 10 percent of consumers thought
24 there should have been pistachio in there, you know, I'd
25 urge you to think with great care before you filed that.

Proceedings

1 On the other hand, there's suggestions of other
2 signage, the larger context, whatever. You know, I'm not
3 limiting what you can do. I'm not telling you what to
4 do. But I will deem it dismissed without prejudice to
5 re-filing. But that's going to last a period of 30 days.
6 At the end of 30 days, if you don't re-file, which is
7 fine because that might be the right outcome if that's
8 the right outcome, if you don't re-file, it will be
9 deemed to be with prejudice at that point. Does that
10 sound reasonable?

11 MR. NASSIR: Yes, your Honor. Thank you very
12 much.

13 THE COURT: Okay. Good. Anything else I can
14 do for you all today?

15 MR. WILLEMS: Not on behalf of the defense,
16 your Honor. Thank you for your time and attention. We
17 appreciate it.

18 THE COURT: Okay.

19 MR. NASSIR: Not on behalf of plaintiff. Thank
20 you, your Honor.

21 THE COURT: Okay. So let me just say,
22 reiterate what I said before just in case it got lost.
23 Counsel did a fine job on this. You really did a great
24 job. You made this easy to decide in the sense of by
25 being well prepared. And you should tell your clients

Proceedings

1 that you saved everyone a lot of time and expense, so
2 that's a good thing. So that's good. And I'll ask you
3 to enjoy the rest of your summer. All right?

4 MR. NASSIR: Thank you, your Honor.

5 THE COURT: All right. Be well.

6 MR. WILLEMS: Thank you, your Honor.

7 THE COURT: Bye.

8 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 1st day of September, 2023.



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